

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

SCOTT DOLEMBA,
on behalf of plaintiff and a class,

Plaintiff,

vs.

AMERICAN MICROMARKETS, INC.,
doing business as
MARKOTS.COM,

Defendants.

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COMPLAINT – CLASS ACTION

INTRODUCTION

1. Plaintiff Scott Dolemba brings this action to secure redress for the placement of an illegal telemarketing call to his cell phone, in violation of the Telephone Consumer Protection Act, 47 U.S.C. 227 (“TCPA”) and state law.

JURISDICTION AND VENUE

2. This Court has jurisdiction under 28 U.S.C. §1331, *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 751-53 (2012); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005), and 28 U.S.C. §1367.

3. Personal jurisdiction exists under 735 ILCS 5/2-209, in that defendant:
- a. Has committed tortious acts in Illinois by causing the transmission of unlawful communications into the state.
 - b. Has transacted or done business in Illinois.
4. Venue in this District is proper for the same reason.

PARTIES

5. Plaintiff Scott Dolemba is a resident of the Northern District of Illinois.
6. Defendant American Micromarkets, Inc., doing business as Markots and Markots.com, is a California corporation. Its principal offices are at 470 Harvest Park Drive,

Suite A, Brentwood, California 94513. Its registered agent is Riyaz Gulamani a/k/a Ray Gulam at the same location.

FACTS

7. On May 13, 2015, plaintiff received a telephone call from 877-946-7253 on his cell phone. (Exhibit A) This is plaintiff's only telephone.

8. On information and belief, the call was initiated by an automatic telephone dialing system.

9. The call played a prerecorded voice to deliver a promotional message.

10. The number 877-946-7253 is used by defendant to promote and sell various services. (Exhibits B-G)

11. One who dials 877-946-7253 gets a recorded message offering the choice of various menu selections from defendant.

12. Plaintiff had no relationship with defendant and had not consented to the call.

13. Defendant either negligently or wilfully violated the rights of plaintiff and other recipients in placing the calls.

14. Plaintiff suffered damages as a result of receipt of the call. Furthermore, plaintiff's statutory right of privacy was invaded.

15. Plaintiff is entitled to statutory damages.

16. Defendant violated the TCPA even if its actions were only negligent.

17. Defendant should be enjoined from committing similar violations in the future.

COUNT I – TCPA

18. Plaintiff incorporates paragraphs 1-17.

19. The TCPA provides, at 47 U.S.C. §227(b):

Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States–

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice— . . .

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

20. Plaintiff had not consented to defendant's communications.

21. The TCPA provides, 47 U.S.C. §227(b)(3) provides:

Private right of action.

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State-

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$ 500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the Court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the subparagraph (B) of this paragraph.

CLASS ALLEGATIONS

22. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons (b) who, between a date four years prior to the filing of this action and 21 days after the filing of this action, (c) received a call on a cell phone (d) which call used an automatic telephone dialing system or a prerecorded or artificial voice (e) and was placed by or on behalf of defendant.

23. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

24. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions

include:

- a. Whether defendant engaged in a pattern of making or causing to be made telemarketing calls using a recorded or artificial voice;
- b. The manner in which defendant compiled or obtained its list of telephone numbers;
- c. Whether defendant obtained the consent of the called parties;
- d. Whether defendant thereby violated the TCPA.

25. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

26. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

27. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

28. Several courts have certified class actions under the TCPA: *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036 (9th Cir. 2012); *Manno v. Healthcare Revenue Recovery Group, LLC*, 289 F.R.D. 674 (S.D.Fla. 2013); *Mitchem v Illinois Collection Serv.*, 271 F.R.D. 617 (N.D.Ill. 2011); *Balbarin v. North Star Capital Acquisition, LLC*, 10 C 1846, 2011 U.S. Dist. LEXIS 686 (N.D. Ill., Jan. 5, 2011), later opinion, 2011 U.S. Dist. LEXIS 5763 (N.D.Ill., Jan. 21, 2011), later opinion, 2011 U.S. Dist. LEXIS 58761 (N.D. Ill., June 1, 2011); *Lo v. Oxnard European Motors, LLC*, 11CV1009 JLS (MDD), 2012 U.S. Dist. LEXIS 73983 (S.D.Cal., May 29, 2012); *Sadowski v. Med1 Online, LLC*, 07 C 2973, 2008 U.S. Dist. LEXIS 41766 (N.D.Ill., May 27, 2008); *CE Design Ltd. v Cy's Crabhouse North, Inc.*, 259 F.R.D. 135

(N.D.Ill. 2009); *Targin Sign Sys. v Preferred Chiropractic Ctr., Ltd.*, 679 F. Supp. 2d 894 (N.D.Ill. 2010); *Garrett v. Ragle Dental Lab, Inc.*, 10 C 1315, 2010 U.S. Dist. LEXIS 108339, 2010 WL 4074379 (N.D.Ill., Oct. 12, 2010); *Hinman v. M & M Rental Ctr.*, 545 F.Supp. 2d 802 (N.D.Ill. 2008); *Clearbrook v. Rooflifters, LLC*, 08 C 3276, 2010 U.S. Dist. LEXIS 72902 (N.D. Ill. July 20, 2010) (Cox, M.J.); *G.M. Sign, Inc. v. Group C Communs., Inc.*, 08 C 4521, 2010 U.S. Dist. LEXIS 17843 (N.D. Ill. Feb. 25, 2010); *Holtzman v. Turza*, 08 C 2014, 2009 U.S. Dist. LEXIS 95620 (N.D.Ill., Oct. 14, 2009); *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642 (W.D.Wash. 2007); *Display South, Inc. v. Express Computer Supply, Inc.*, 961 So.2d 451, 455 (La. App. 1st Cir. 2007); *Display South, Inc. v. Graphics House Sports Promotions, Inc.*, 992 So. 2d 510 (La. App. 1st Cir. 2008); *Lampkin v. GGH, Inc.*, 146 P.3d 847 (Ok. App. 2006); *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. (App.) 94, 50 P.3d 844 (2002); *Core Funding Group, LLC v. Young*, 792 N.E.2d 547 (Ind.App. 2003); *Critchfield Physical Therapy v. Taranto Group, Inc.*, 293 Kan. 285; 263 P.3d 767 (2011); *Karen S. Little, L.L.C. v. Drury Inns, Inc.*, 306 S.W.3d 577 (Mo. App. 2010); *Travel 100 Group, Inc. v. Empire Cooler Service, Inc.*, 03 CH 14510 (Cook Co. Cir. Ct., Oct. 19, 2004); *Rawson v. C.P. Partners LLC*, 03 CH 14510 (Cook Co. Cir. Ct., Sept. 30, 2005); *Nicholson v. Hooters of Augusta, Inc.*, 245 Ga.App. 363, 537 S.E.2d 468 (2000).

29. Management of this class action is likely to present significantly fewer difficulties that those presented in many class actions, e.g. for securities fraud.

30. WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendants for:

- a. Statutory damages;
- b. An injunction against the further transmission of unsolicited fax advertising;
- c. Costs of suit;
- d. Such other or further relief as the Court deems just and proper.

COUNT II – ILLINOIS CONSUMER FRAUD ACT

31. Plaintiff incorporates paragraphs 1-17.
32. Defendant engaged in unfair acts and practices, in violation of ICFA § 2, 815 ILCS 505/2, by making an unauthorized robocall to plaintiff's cell phone.
33. Defendant's conduct is contrary to public policy, as set forth in the TCPA.
34. Plaintiff suffered damages as a result of receipt of the call.
35. Defendant engaged in such conduct in the course of trade and commerce.
36. Defendant should be enjoined from committing similar violations in the future.

CLASS ALLEGATIONS

37. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons (b) who, between a date three years prior to the filing of this action and 21 days after the filing of this action (c) received a call on a cell phone (d) which call used an automatic telephone dialing system or a prerecorded or artificial voice (e) and was placed by or on behalf of defendant.

38. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

39. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of making or causing to be made telemarketing calls using a recorded or artificial voice;
 - b. The manner in which defendant compiled or obtained their list of telephone numbers;
 - c. Whether defendant thereby violated the TCPA.
40. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has

retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

41. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

42. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

43. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and against defendant for:

- a. Compensatory and punitive damages;
- b. An injunction against further violations;
- c. Attorney's fee, litigation expenses and costs of suit;
- d. Such other or further relief as the Court deems just and proper.

/s/ Daniel A. Edelman
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NOTICE OF LIEN AND ASSIGNMENT

Please be advised that we claim a lien upon any recovery herein for 1/3 or such amount as a court awards. All rights relating to attorney's fees have been assigned to counsel.

/s/ Daniel A. Edelman
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